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IN THE
United States Supreme Court
OCTOBER TERM, 1983

JAMES E. ARRINGTON,
Petitioner (Appellee Below),

v.

UNITED STATES OF AMERICA,
Respondent (Appellant Below).

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the federal trial court's post-verdict assessment of evidentiary insufficiency, resulting in its grant of motion for judgment of acquittal pursuant to Fed.R. Crim. P. 29(c), should be accorded the same absolute deference which is provided by the nonappealability of preverdict acquittals based upon evidentiary insufficiency.

A. Whether the apparent "asymmetry" which would result from applying different standards of review to government and defendant appeals (absolute deference in the latter situation), following the trial court's ruling on motion for post-verdict judgment of acquittal, simply reflects the fundamental and proper "asymmetry" always favoring criminal defendants in the criminal justice system.

B. Whether a rule according absolute deference to the trial court's post-verdict assessment of evidentiary insufficiency, resulting in its grant of motion for judgment of acquittal, would nullify the government's right to appeal post-verdict acquittals pursuant to 18 U.S.C. §3731.

2. Assuming *arguendo* that *de novo* review of the trial court's judgment of acquittal is proper, should the standard of review be that articulated in *Glasser v. United States,* 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed.2d 680 (1942), or that articulated in *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

PARTIES

The only parties to this action are those named in the case caption, James E. Arrington (Petitioner, Appellee Below) and United States of America (Respondent, Appellant Below).

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OPINIONS IN COURTS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit in this case has not yet been published in official form. The court's slip opinion is reproduced in the Appendix to this petition. *United States of America v. James E. Arrington,* No. 82-5250 (4th Cir., October 14, 1983).

The United States District Court for the Western District of Virginia, which granted petitioner's motion for judgment of acquittal on August 26, 1982, did not write an opinion in this case. The court's oral remarks made from the bench on August 26, 1982 have been transcribed and are reproduced in the Appendix to this petition.

GROUNDS OF JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit in this case was dated and entered on October 14, 1973. No motion for re-hearing was made, and no extension of time for filing this petition was requested.

This Court has subject matter jurisdiction pursuant to 28 U.S.C. §1254 to review the judgment, by writ of certiorari granted upon timely petition of a party (here, James E. Arrington, appellee below).

The instant case is in a unique procedural posture, which must be considered with respect to the issue of this Court's jurisdiction.

Following a four-day jury trial in the United States District Court for the Western District of Virginia, petitioner was found guilty of aiding and abetting in the interstate receipt and sale of stolen property, 18 U.S.C. §§2315 and 2. Petitioner filed timely motions for judgment of acquittal, Fed.R.Crim.P. 29(c), and in the alternative for new trial, Fed.R.Crim.P. 33. On August 26, 1982 the district court granted the motion for judgment of acquittal, based solely upon the insufficiency of the evidence to support the jury's verdict. The district court did not rule on the motion for new trial.

The government appealed the post-verdict judgment of acquittal, pursuant to 18 U.S.C. §3731, to the United States Court of Appeals for the Fourth Circuit. Sufficiency of the evidence to sustain the jury's verdict was the sole issue presented to and decided by the appellate court. On October 14, 1983 a three-judge panel reversed the judgment of the district court, remanding the case for reinstatement of the jury's verdict and for further proceedings consistent with its opinion.

Upon remand, the motion for new trial was argued and a briefing schedule was ordered; the motion is now pending in the breast of the district court.

Notwithstanding the proceedings now pending in the district court, the judgment of the United States Court of Appeals for the Fourth Circuit is final with respect to the issues presented in this petition. The appellate court's judgment is ripe for review at this time; if review is declined or deferred, petitioner's rights will be forever lost.

First. SC.R. 20 (the sixty-day rule) may preclude petitioner from raising these particular issues, which were finally decided by the judgment of the appellate court on October 14, 1983 and cannot be raised again at any stage of the proceedings, at any time in the future (assuming that petitioner's pending motion for new trial is decided adversely to him by the district court, that petitioner's subsequent appeal from the conviction is decided adversely to him by the appellant court, and that petitioner then seeks review in this court). With respect to the issue of sufficiency of the evidence, it may well be now or never.

Second. In view of the procedural posture of this case, petitioner is necessarily urging the district court to exercise its discretion under Fed.R.Crim.P. 33 and grant him a new trial. However, if the October 14, 1983 judgment of the appellate court is incorrect – if, as petitioner contends, there was not sufficient evidence to sustain the jury's verdict – then petitioner is constitutionally entitled to a judgment of acquittal and his retrial would be barred by the Double Jeopardy Clause of the United States Constitution. Thus, absent review by this Court at this time, petitioner is forced to *seek* retrial as his best available remedy, in the teeth of the constitutional provision which *protects* him from having to undergo such retrial.

Absent review of the case by this Court, at this time, petitioner must deliberately relinquish his constitutional rights in order to try and achieve his ultimate goal: justice, by acquittal.

Constitutional Provisions and Statutes

CONSTITUTION OF THE UNITED STATES, AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

TITLE 18, UNITED STATES CODE, SECTION 3731

§3731. Appeal by United States

In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

An appeal by the United States shall lie to a court of appeals from a decision or order of a district court suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict

or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.

Pending the prosecution and determination of the appeal in the foregoing instances, the defendant shall be released in accordance with chapter 207 of this title.

The provisions of this section shall be liberally construed to effectuate its purposes.

FEDERAL RULES OF CRIMINAL PROCEDURE,
RULE 29(c)

(c) Motion After Discharge of Jury

If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned the court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury.

STATEMENT OF THE CASE

Petitioner James E. Arrington, an attorney licensed to practice law in the Commonwealth of Virginia, was indicted by a federal grand jury on October 14, 1981 on one

count of conspiracy to receive, sell or dispose of stolen goods in interstate commerce, 18 U.S.C. §371, and one count of aiding and abetting the receipt and sale of this property, 18 U.S.C. §§2315 and 2. Petitioner pled not guilty to both charges in the United States District Court for the Western District of Virginia.

Following a four-day jury trial, on May 7, 1982 petitioner was acquitted of the conspiracy charge but convicted of the aiding and abetting charge. He filed timely post-verdict motions for judgment of acquittal, Fed.R. Crim.P. 29(c), and in the alternative for new trial, Fed.R. Crim.P. 33. On August 26, 1982 the district court granted the motion for judgment of acquittal, on the ground that the evidence at trial was insufficient to support the jury's verdict. (Appendix B, pp. 13a-40a) The district court entered its order that same day. (Appendix B, p. 12a)

Pursuant to 18 U.S.C. §3731, the government appealed to the United States Court of Appeals for the Fourth Circuit. Following briefing and oral argument, a three-judge panel of the appellate court reversed the district court's judgment on October 14, 1983, remanding the case for reinstatement of the jury's verdict and for further proceedings.[1]

The government's proof at trial is summarized in the opinion of the United States Court of Appeals for the Fourth Circuit. (Appendix A, pp. 2a-11a) Faithful to the standard of *Glasser v. United States,* 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed.2d 680 (1942), which had earlier been held to be the proper standard for appellate review of post-verdict

[1]As noted in the discussion under *Grounds of Jurisdiction, infra,* further proceedings on remand are now pending in the district court. Argument has been had on petitioner's motion for new trial, Fed.R.Crim.P. 33, a briefing schedule has been ordered, and the motion is in the breast of the district court.

acquittals, *see United States v. Steed,* 674 F.2d 284 (4th Cir.) (*en banc*), *cert. denied,* ____ U.S. ____, 103 S.Ct. 67, 74 L.Ed.2d 68 (1982), [*Steed II*] all of the evidence at trial was viewed by the appellate court in a light most favorable to the government.

All government witnesses assumed a patina of absolute credibility – the light most favorable to the government. All inferences, however tenuous and unsupported they might be, were drawn in favor of the "verdict winner" – the light most favorable to the government. All of the evidence supporting the petitioner's defenses, no matter how strong, was discounted entirely – the light most favorable to the government.

The district court's careful assessment of the evidence, and the insufficiency of such evidence to sustain the verdict, was totally ignored; review by the appellate court was *de novo,* as if the district court's judgment were a nullity.

Petitioner contended below, and still contends, that the evidence at this trial was insufficient to sustain a conviction under any standard of review which might be utilized in any court, trial or appellate. However, it is the standard of review adopted by the appellate court, no the particular evidence in this case, which forms the basis for this petition for writ of certiorari. Thus a detailed recitation of the facts of the case is unnecessary here.

The precise holding of the United States Court of Appeals for the Fourth Circuit in petitioner's case, of which he complains, is as follows:

> In *Steed [Steed II, supra],* we held that the same standard applies whether we are reviewing the government's appeal of a judgment of acquittal entered after a jury verdict of guilty or the

> defendant's appeal of a jury conviction. "The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it." 674 F.2d at 286 (quoting *Glasser v. United States,* 315 U.S.C. 60, 80 (1942).

United States of America v. James E. Arrington, No. 82-5250 (4th Cir., October 14, 1983), Slip Opinion at 7 (Appendix A, p. 7a)

In applying this standard to review the district court's determination of evidentiary insufficiency, the appellate court stripped petitioner of his right to due process of law, specifically, his right not to be convicted of a crime except upon proof beyond a reasonable doubt. *Cf. Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). Further, the appellate court stripped the district court of one of its traditional protective functions, the filtering out of deficient prosecutions, all to the detriment of petitioner. *Cf. United States v. Martin Linen Supply Co.,* 430 U.S. 564, 978 S.Ct. 1349, 51 L.Ed.2d 642 (1977). Finally, the appellate court effected a drastic shift in the balance of the federal criminal justice system, altering the traditional system of "checks and balances" which has always operated in favor of the criminal defendant. As Judge James Dickson Phillips wrote in *United States v. Steed,* 646 F.2d 136, 141 (4th Cir. 1981) [*Steed I*], later superseded by the *en banc* opinion in*Steed II:*

> In the system of checks and balances that has emerged, the power of each entity [court] unilaterally to find factual guilt is at every turn constrained while the power of each unilaterally to acquit is without constraint.

(Footnotes omitted)

This Court has never ruled on the proper standard for appellate review where, as here, the district court has entered post-verdict judgment of acquittal based on insufficiency of the evidence. The various courts of appeals are applying a bewildering variety of standards, albeit all *de novo,* and all without any reasoned analysis of the second considerations supporting a rule of absolute deference to the district court's factual determination of evidentiary insufficiency.

The instant case presents a proper vehicle for this Court to hear and determine this issue. The issue is one of fundamental importance to the criminal justice system; and further, the issue is one of fundamental importance to this petitioner who deserves justice in the federal courts.

ARGUMENT

Each issue presented for review in this case constitutes a different facet of the same basic question: what weight, if any, should the federal appellate court give to the district court's post-verdict assessment of insufficiency of the evidence. This Court has never addressed the question.

Only two of the courts of appeals have squarely faced the issues, the Fourth Circuit in *United States v. Steed,* 646 F.2d 136 (4th Cir. 1981) [*Steed I*], and *United States v. Steed,* 674 F.2d 136 (4th Cir.) (*en banc*), *cert. denied,* __ U.S. __, 103 S.Ct. 67, 74 L.Ed.2d 68 (1982) [*Steed II*]; and the D.C. Circuit in *United States v. Singleton,* 702 F.2d 1183 (D.C. Cir. 1983) (*en banc*) [*Singleton I*], and *United States v. Singleton,* 702 F.2d 1159, 1171-73 (D.C. Cir. 1983) (dissenting opinion) [*Singleton II*]. Most of the circuits have "decided" the issues *sub silentio,* without setting forth any reasoning to support their conclusions.

In its initial consideration of the issues in *Steed I*, a unanimous panel of the United States Court of Appeals for the Fourth Circuit held that total deference should be given to the district court's assessment of evidentiary sufficiency. Upon rehearing *en banc*, in *Steed II*, a majority of the Court (including one member of the original panel) held that no consideration at all should be given to the district court's opinion, but rather appellate review should be *de novo*.

The United States Court of Appeals for the District of Columbia has held that *some* deference should be accorded to the district court's opinion.

> We have concluded that we do not defer to the district court, because we must make our own independent judgment regarding the sufficiency of evidence. In so doing, of course, *we may consider and be influenced by the opinion of the expert trial judge who has lived with the case* — just as we give weight to one another's views.

United States v. Singleton [Singleton I], *supra*, 702 F.2d at 1184 (emphasis supplied). In *Singleton II*, dissenting Judge J. Skelly Wright complained that the court had totally failed to "consider and be influenced by" the district court's assessment of evidentiary sufficiency — the very standard the appellate court had just adopted in *Singleton I*. 702 F.2d at 1171.

The various other courts of appeals have applied the "no deference" standard of the Fourth Circuit in *Steed II*, albeit without any consideration or discussion of the legal and philosophical underpinning of their respective decisions. *United States v. DeGarces*, 518 F.2d 1156 (2nd Cir. 1975); *United States v. Dixon*, 658 F.2d 181 (3rd Cir. 1981); *United States v. Burns*, 597 F.2d 939 (5th Cir.

1979); *United States v. Blasco,* 581 F.2d 681 (7th Cir.) *cert. denied,* 439 U.S. 966, 99 S.Ct. 456, 58 L.Ed.2d 425 (1978); *United States v. Donohue,* 539 F.2d 1131 (8th Cir. 1976); *United States v. Rojas,* 545 F.2d 938 (9th Cir. 1977); *United States v. Dreitzler,* 577 F.2d 539 (9th Cir. 1978), *cert. denied,* 440 U.S. 921, 99 S.Ct. 1246, 59 L.Ed.2d 473 (1979); *United States v. Calloway,* 562 F.2d 615 (10th Cir. 1977).

Judge James Dickson Phillips of the Fourth Circuit (joined by Judge H. Emory Widener), and Judge J. Skelly Wright of the D.C. Circuit, have extensively analyzed the matters at issue here, and recognized their fundamental importance to the administration of justice. Both of these legal scholars concluded that the rule of *de novo* review on appeal, with no consideration or weight given to the district court's assessment of evidentiary insufficiency, is a fundamentally erroneous standard. Judge Phillips in particular demonstrated *why.*

Issue I: Whether the federal trial court's post-verdict assessment of evidentiary insufficiency, resulting in grant of motion for judgment of acquittal pursuant to Fed.R. Crim.P. 29(c), should be accorded the same absolute deference which is provided by the nonappealability of preverdict acquittals based upon evidentiary insufficiency.

All of the sound reasons – legal analysis, policy considerations, and historical underpinning – supporting the rule of absolute deference on review were cogently analyzed by Judge Phillips in *Steed I, supra.* The petitioner cannot improve on this masterful analysis, and thus he urges this Court to give careful consideration to Judge Phillips' reasoning.

> We believe that the appropriate standard of review is to be found by considering the effect

that it will have upon the traditional powers of federal trial judges to protect criminal defendants from the possibility of jury abuses or excesses as an aspect of their broader, historical function of "filtering out deficient prosecutions." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 575, 97 S.Ct. 1349, 1356, 51 L.Ed.2d 642 (1977). Until the 1970 Act, that power had been essentially absolute, since no judge-directed judgment of acquittal for insufficiency of evidence was appealable – whether entered before or after jury verdict and even if based upon an "egregiously erroneous foundation," *Fong Foo v. United States*, 369 U.S. 141, 143, 82 S.Ct. 671, 672, 7 L.Ed.2d 629 (1962); see also *United States v. Sisson*, 399 U.S. 267, 289-90, 90 S.Ct. 2117, 2129, 26 L.Ed.2d 608 (1970). By its continuation of that immunity to any review with respect to pre-verdict fact-based acquittals in the 1970 Act, see *United States v. Scott*, 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978); *United States v. Sanabria*, 437 U.S. 54, 98 S.Ct. 2170, 57 L.Ed.2d 43 (1978), Congress presumably intended to continue the traditional protective power unchanged in that context, even while exposing post-verdict acquittals to some degree of appellate review. This gives rise to the anomaly earlier noted in our discussion of the effect of the Double Jeopardy Clause in dis-allowing appeal in the former and allowing it in the latter context. Because this incident of double jeopardy protection has no apparent relation to the historical purposes of the protective power, we think that the scope and standard of appellate review should be narrowly drawn to avoid any erosion of the power in the post-verdict setting. By this means, an anomaly that we find difficult to attribute to deliberate Congressional design will be reduced in practical effect and appellate review of post-verdict ac-

quittals made more compatible with what we think was the likely overall intent of Congress.

Issue 1(A):

Again, petitioner must defer to Judge Phillips' scholarly analysis of the ". . . fundamental asymmetry favoring criminal defendants that pervades our criminal justice system." *Steed I, supra,* 646 F.2d at 140. Judge Phillips traces the historical power of the court to acquit – prior to the return of the jury verdict, but after jeopardy attaches, an absolute power to err in favor of the defendant – and the concomitant restraint on the power of the court to convict, which constraint remains absolute. *Id.* at 140-142. A rule of absolute deference to the trial court's post-verdict determination of evidentiary insufficiency, Judge Phillips correctly concludes, is totally consistent with the "fundamental allocation of protective powers" in the federal courts, "an allocation marked throughout by asymmetry." *Id.* at 142.

In addition, this Court should consider the gross "asymmetry" which can result from *de novo* review of the trial court's ruling on motion for judgment of acquittal: *the criminal defendant is severely penalized for trial court error.* When judgment of acquittal is granted pursuant to Fed.R.Crim.P. 29(c), the trial court admits, in essence, that it erred in permitting the case to go to the jury. The rule of review in *Steed II, supra,* permits this error to be compounded when the trial court can then be "second guessed" on appeal. The trial court's ruling, had it come at the proper time (defendant being entitled to judgment of acquittal prior to submission of the case to the jury), would have been unappealable; however, once the trial court erred initially and sent the case to the jury, the defendant forever loses the protection of nonappealability

even though the trial court subsequently rectifies the mistake. This is an absurd result, far more absurd than the "apparent asymmetry" which so concerned the *en banc* court in Steed I, supra.

Issue 1(B):

The bugbear of statutory nullification was neatly laid to rest by Judge Phillips.

> Neither does according absolute deference to the trial judge's evidence assessments in this context make empty the government's right of appeal under the Act. Deference extends only to purely factual assessments that the evidence was insufficient to convict. This leaves open for review the preliminary question whether this was indeed the basis for the acquittal. If it is determined that it was not, the revealed basis will then be subject to free review and to correction by reinstatement of the verdict if prejudicial error is found in it.
>
> The review function thereby preserved is by no means an inconsiderable one. As Justice Brennan has pointed out, application of the test of appealability of pre-verdict dismissals adopted in *United States v. Scott,* 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed.2d 65, turning as it does upon the question whether the dismissal was based upon purely factual assessments of insufficiency of the evidence to convict or upon grounds "unrelated to factual guilt or innocence," will frequently be a difficult one. 437 U.S. at 110-16, 98 S.Ct. at 2203-06 (Brennan J., dissenting). Because we consider that the same test should apply to determine the scope of absolute deference in review of post-verdict acquittals the task of review may be equally difficult. *Cf. United States v. Burroughs,* 564 F.2d 1111 (4th Cir. 1977). For review purposes it will of course be made easier by trial court specification of the exact basis of decision.

> Where no basis is specified or is implicit in the record we think it appropriate to assume upon appeal that the basis was factual insufficiency.

Steed I, supra, 646 F.2d at 142.

As a practical matter, the fear of nullification of the government's right to appeal is largely illusory. In only a small number of reported cases since passage of 18 U.S.C. §3731 have the district courts granted post-verdict judgment of acquittal on the sole ground of insufficiency of the evidence. It is apparent that the federal trial courts are utilizing their post-verdict power sparingly. The appellate courts have not been flooded with government appeals from judgments of acquittal following jury verdicts of guilty.

In the occasional case where this occurs, it should be presumed that the trial judge utilized its special expertise, in the context of its intimate familiarity with the case, and acted properly. The appellate court, with only the cold record before it, is in a poor position to "second guess."

Issue II: Assuming *arguendo* that *de novo* review of the trial court's judgment of acquittal is proper, should the standard on review be that articulated in *Glasser v. United States,* 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed.2d 680 (1942), or that articulated in *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

The long established standard for review of the trial court's denial of motion for judgment of acquittal, and/or defendant's appeal of his underlying conviction, is set forth in *Glasser v. United States, supra,* 315 U.S. at 80.

> "The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it."

This is the standard which has been applied in *Steed II, supra,* for review of the trial court's post-verdict grant of judgment of acquittal based on the ground of evidentiary sufficiency. This is the standard which was applied in the instant case. *United States v. James E. Arrington,* No. 82-5250 (4th Cir. October 14, 1983).

Other circuit courts of appeals have adopted a standard phrased in the language of *Jackson v. Virginia,* 443 U.S. 307, 324, 99 S.Ct. 2781, 61 L.Ed.2d 560, 576 (1979):

> [Whether] upon the record evidence adduced at the trial [any] rational trier of fact could have found proof of guilt beyond a reasonable doubt.

In most of the cases from the various courts of appeals, cited earlier herein, the standard of review articulated is a mixture of the *Glasser* and *Jackson* language.

Interestingly, there is a division of opinion as to whether the *Glasser* and *Jackson* standards are identical; and, if they are not, which standard is more beneficial to a defendant. Judge H. Emory Widener, in his concurring opinion in *Steed I,* indicated his belief that the standards are not the same, but that the *Glasser* standard ". . . should be construed to give a federal appellate court more leeway in reviewing the sufficiency of the evidence on appeal from a conviction in a federal district court than it has in reviewing the sufficiency of the evidence of a conviction in a state court by way of habeas corpus." *Steed I, supra,* 646 F.2d at 143. On the other hand, Judge James C. Turk, United States District Judge for the Western District of Virginia, indicated during oral argument in this case that he views the *Jackson* standard as more protective of the defendant – resulting in an anomaly whereby appellate review on collateral attack of state conviction is more expansive than appellate review on direct appeal of convic-

tion in federal court. This petitioner agrees with Judge Turk that the *Jackson* standard appears to be more beneficial to the defendant than the *Glasser* standard. The concept of reasonable doubt is fundamental in *Jackson;* whereas the concept of "substantial evidence" in *Glasser* is suggestive of a preponderance standard. *Glasser,* as applied if not as intended, is faithless to the promise of *In re Winship,* 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

In the various cases cited, including this case, wherein judgment of acquittal was granted by the trial court and then reversed by the appellate court, the courts of appeals appear *in fact* to be utilizing the discredited "no evidence rule" of *Thompson v. Louisville,* 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 654 (1960). The articulated standards of *Glasser* and *Jackson*, as applied on *de novo review* in this context, seem to mean little more than *some* evidence was presented with respect to each element of the offense charged. *Some* evidence – however scant, however slight. "Viewing the evidence in a light most favorable to the Government " means, in application, that a shred of evidence is sufficient evidence; that all Government witnesses must be deemed worthy of credibility, since – working backward in logic – the jury must have believed them; that every conceivable inference in favor of the Government must be drawn, no matter how tenuous and no matter how illogical; and that all of the defendant's evidence must be disregarded, since – again working back ward in logic – the jury must necessarily have disregarded such evidence in finding guilt.

This is precisely what occurred in the instant case, when the United States Court of Appeals for the Fourth Circuit reviewed petitioner's case under the (ostensible) *Glasser* standard. One shred of direct evidence, together with

several tenuous and wholly illogical inferences which were pyramided on the shred, were held to constitute "substantial evidence." Thus, the jury verdict was ordered reinstated, even though no rational trier of fact could have found petitioner guilty *beyond a reasonable doubt* on the basis of this "substantial evidence."

The Due Process Clause of the United States Constitution ". . . protects a defendant in a criminal case against conviction 'except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.' " *Jackson v. Virginia, supra,* 443 U.S. at 315, 61 L.Ed.2d at 571 (citation omitted). These words, and this promise, have been drained of meaning by the sterile rule of review utilized by the appellate court on review of the trial court's post-verdict grant of judgment of acquittal; all on a cold record; and with *no* deference accorded to the expertise of the trial judge who "lived with the case" and heard and saw the evidence.

CONCLUSION

For all of the reasons set forth herein, this Court should grant the petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit, and should resolve these issues which are of fundamental importance to the criminal justice system.

/s/ STANLEY E. PREISER

/s/ BARBARA H. FLEISHER

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Counsel for Petitioner,
James E. Arrington

APPENDIX A

JUDGMENT
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 82-5250

United States of America,

Appellant,

vs.

James E. Arrington,

Appellee.

Appeal from the United States District Court for the District of Virginia.

The cause came on to be heard on the record from the United States District Court for the Western District of Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed. The case is remanded to the United States District Court for the Western District of Virginia, at Abingdon, for reinstatement of the jury's verdict and further proceedings consistent with the opinion of this Court filed herewith.

FILED
OCT 14 1983
U.S. Court of Appeals
Fourth Circuit

/s/ William K. Slate II
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 82-5250

United States of America,

Appellant,

v.

James E. Arrington,

Appellle.

Appeal from the United District Court for the Western District of Virginia, at Abingdon. James C. Turk, District Judge. CR 81-98-A

Argued: April 15, 1983 Decided: October 14, 1983

Before WIDENER and SPROUSE, Circuit Judges, and FOX,* District Judge.

William P. Sellers, IV, Assistant United States Attorney (John P. Alderman, United States Attorney, Thomas J. Bondurant, Jr., Assistant United States Attorney on brief) for Appellant; Barbara H. Fleisher (Preiser and Wilson, L.C. on brief) for Appellee.

SPROUSE, Circuit Judge:

The United States of America appeals from the judgment of the district court acquitting attorney James E. Ar-

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*Hon. James C. Fox, United States District Judge for the Eastern District of North Carolina, sitting by designation.

rington, Jr., for lack of sufficient evidence, after a jury had found him guilty of aiding and abetting the receipt and sale of stolen construction equipment moving in interstate commerce, in violation of 18 U.S.C. § 2315. The government contends that there was substantial evidence to support the jury's verdict under the standard of *United States v. Steed,* 674 F.2d 284 (4th Cir. 1982) (en banc). We agree and reverse the district court's judgment of acquittal.

Four men, Mitchell, Crockett, Sexton, and Davenport stole a truck, attached trailer, and backhoe in Georgia and brought them to Virginia where a "finder" introduced them to an innocent purchaser, Shipley. Charles Mays, an ex-police officer, was an investigator for Arrington's firm, who sometimes solicited legal business for the firm in exchange for a portion of the fees. He invested several thousand dollars in the criminal enterprise after the equipment arrived in Virginia, and helped the four men move the items to a storage location in Buchannon County, Virginia. The government does not contend that Arrington was involved in or was even aware of the theft and transportation until after those criminal acts were completed and he was employed as an attorney to effect transfer of the equipment to Shipley.

It is the testimony concerning Mays' association with Mitchell, Crockett, and Sexton, and their subsequent association with Arrington, that generates the issue of whether the jury's conviction rested on substantial evidence. That evidence, viewed most favorably to the government, *United States v. Steed,* 674 F.2d at 286, shows that a "finder" brought Shipley to the group's attention. Shipley offered and the group accepted $19,200 for the three pieces of equipment. Shipley, who was from Tenneseee, had an attorney in that state, but none in Virginia.

Crockett suggested two attorneys from Arrington's nearby firm. Shipley and the group possessing the illegally obtained equipment agreed to meet in Arrington's law office the next day. Arrington was still not aware of the pending transaction.

Mays, Crockett, and Sexton, anticipating an attempt to transfer title, concocted a story that a fictitious owner had physical possession of the titles to the equipment. Their scheme called for Sexton to respond to the fictitious owner's name at a given telephone number should Arrington call concerning the titles. There is no evidence that Arrington was aware of this scheme.

The meeting was held as proposed in Arrington's office on July 8, 1980. Crockett, Shipley, Arrington, and others were present. Mays was not there that day, having business in another town. Crockett ushered the other participants to Arrington's upstairs office. Shipley observed what appeared to be a factory bill of sale lying on Arrington's desk with the price Crockett allegedly paid for the backhoe; a telephone number was written on the bill. Arrington called that number, conversed with the person who answered the telephone, and advised the parties that it would take several days to get the titles.

Shipley was reluctant to pay the entire purchase price before receiving valid titles and a bill of sale. The parties agreed that he would take possession of all the equipment immediately, and Arrington would deposit the purchase price of $19,200 in the firm escrow account. There is conflict in the testimony about the exact arrangements for disbursement to which Arrington agreed, and on appeal the government and Arrington dispute the probative inferences flowing from the testimony. Again, viewed in a light most favorable to the government, the jury could

properly have inferred that Arrington agreed to pay $12,500 to Crockett as soon as Shipley's check was honored.[1] At the same time, he was to deliver a check for $1,700 to the "finder." Arrington was to retain $5,000 until Shipley advised him that he had received the title to the truck and trailer.[2]

The following day, July 9, Mays was again in Arrington's office. Arrington had prepared a bill of sale for the backhoe from Crockett to Shipley Homes, Inc., a construction company owned by the purchaser, and told Mays to forge Crockett's name to the bill of sale. After Mays did so, Arrington stated to Mays that "the equipment was stolen." This latter evidence was introduced by the testimony of Mays:

> Okay, at that — After the bill of sale was notarized and after Ms. Jackson had notarized the bill of sale and I had signed it and I walked back down the hall and Mr. Arrington walked back down the hall and he said the equipment was stolen and I said, yeah. He said, well, go ahead and take care of it when he comes in.

This is the only direct evidence probative of Arrington's knowledge that the equipment was stolen at the time of his participation in the initial transfer proceedings.

In addition to the background summarized above, the government at trial presented the following evidence which it maintains corroborates the direct evidence of

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[1]Under Virginia law, it was not necesasry to produce a title in order to tranfer ownership in a backhoe.

[2]This is the disputed portion of this part of the evidence. Arrington contends he was to release the $5,000 when he was satisfied as to the title. The government contends he was only to release it after receiving approval from Shipley.

Mays' testimony. Mays obtained Shipley's address from Arrington and mailed him the backhoe bill of sale bearing Crockett's notarized signature as forged by Mays. Mays obtained a fraudulent Kentucky title for the truck from Sexton and a fraudulent Virginia title for the trailer. Arrington looked at these titles and returned them to Mays. Mays delivered them to Crockett who, in turn, mailed both titles to Shipley.

As soon as Mays obtained the fraudulent titles, Arrington ordered his firm's bookkeeper to disburse all of the funds, including the $5,000 for the truck and trailer. Crockett, Sexton and Mays divided the proceeds of the $12,500 and $5,000 checks.[3] The bookkeeper recorded the disbursements on a ledger and later testified that Arrington seemed irritated when he discovered she had recorded the transaction. She also testified that Arrington did not record his attorney fee of $70.00 in the firm's books.

When Shipley received the titles, he noticed that the Kentucky title was to a 1977 white truck, whereas he had purchased a 1978 blue truck. Shipley's attorney, Caldwell, telephoned Arrington's firm immediately from Tennessee. Caldwell could not contact Arrington, but spoke to a man identifying himself as Mr. Schelin, one of Arrington's partners. He advised Schelin not to distribute the funds, but Schelin investigated and told Caldwell that the funds

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[3]The prosecution introduced testimony of Mays, as hearsay evidence under the umbrella of Fed.R.Evid. 801(d)(2)(E), that Crockett told Mays that Crockett paid Arrington $2,800 from the distribution. As Arrington was acquitted of the conspiracy charge, we agree with him that his evidence cannot be considered in determining whether there was substantial evidence to support the aiding and abetting conviction.

already had been disbursed.[4] Caldwell immediately confirmed the telephone conversation with Schelin by a letter addressed to the Arrington's firm. Two or three days later Caldwell received a telephone call, which he thought and felt was from Arrington's firm, explaining that the flaw in the title was the result of the truck's having been assembled from junk vehicles.

The firm's bookkeeper testified that several months later, after Mays was indicted for his role in the crime, "I told Mr. Arrington that I had heard that the law firm was involved and was it true, was this true. And he said it may have been."

The government, citing our standard of review in *Steed,* contends that the trial court committed error in granting Arrington's motion for acquittal after the jury found him guilty. We agree with the government's contention.

In *Steed,* we held that the same standard applies whether we are reviewing the government's appeal of a judgment of acquittal entered after a jury verdict of guilty or the defendant's appeal of a jury conviction. "The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it." 674 F.2d at 286 (quoting *Glasser v. United States,* 315 U.S. 60, 80 (1942).

Respected arguments have been made that a trial court's judgment of acquital for insuficient evidence after a jury verdict of guilty should have the same weight on appeal as

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[4]Schelin testified that he did not remember this telephone conversation, but the firm bookkeeper testified that he approached her relating a strange telephone call requesting that the funds not be disbursed. The bookkeeper than informed Schelin that the funds had been disbursed and that he should talk to Arrington for the details.

if it were made by the original factfinder.[5]This court adopted a contrary rule in *Steed,* however, and regardless of how we might have weighed the evidence of Arrington's guilt had we been factfinders, in assessing the sufficiency of the evidence to support the jury's determination, we can only inquire whether there is substantial evidence, taking the view most favorable to the government, from which the jury might find the defendant guilty beyond a reasonable doubt. *United States v. Block,* 590 F.2d 535, 543 (4th Cir. 1978); *United States v. Sherman,* 421 F.2d 198, 199 (4th Cir.) (per curiam), *cert. denied,* 398 U.S. 914 (1970). We, of course, do not weigh the evidence or review the credibility of witnesses in resolving the issue of substantial evidence. *Glasser v. United States,* 315 U.S. 60, 80 (1942); *Pigford v. United States,* 518 F.2d 831, 836 (4th Cir. 1975) (per curiam).

The jury was confronted with a clear-cut credibility decision in weighing the testimony of Mays against that of Arrington and other witnesses. We can understand trial court's frustration on observing a witness with Mays' obvious character defects and realizing that the jury verdict, of necessity, rested in large part on the jury crediting his testimony. If there is sufficient evidence under the *Steed* standard, however, a trial court, which would decide the outcome of a criminal case on grounds of credibility and weight of the evidence, must act before the task of resolving factual issues inherent in those grounds are entrusted to the jury. Mays' direct testimony was the linchpin of the government's case. He said simply that Arrington told him the equipment was stolen and instructed him to "take care of it." He said Arrington also had him forge Crockett's

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[5]See the original panel opinion in *Steed,* 646 F.2d 136 (4th Cir. 1981).

name to the bill of sale and forward it to Shipley. We must assume that the jury believed that testimony.

Arrington argues, and we agree, that since this incident occurred on July 9, it does not necessarily establish that he knew of the theft before the thieves came to his office on July 8. It was not necessary, however, for the jury to have gone so far as to conclude that Arrington possessed the requisite knowledge before July 9. It was on July 9 that Mays reappeared on the scene. After that date, Arrington acquired the bogus titles and disbursed the escrowed funds. These later actions formed a sufficient basis to find him guilty of aiding and abetting if he knew on July 9 that the equipment was stolen and illegally transported. To be convicted of aiding and abetting, "[p]articpation in every stage of an illegal venture is not required, only participation at some stage accompanied by knowledge of the result and intent to bring about that result." *United States v. Hathaway,* 534 F.2d 386, 399 (1st Cir.) *cert. denied,* 429 U.S. 819 (1976).

The uncorroborated testimony of one witness may be sufficient to sustain a verdict of guilty. *United States v. Shipp,* 409 F.2d 33 (4th Cir.), *cert. denied,* 396 U.S. 864 (1969).[6] Whether it is sufficient, of course, depends on the probative force of the actual testimony. In this case, however, the sufficiency does not rest alone on the probative vitality of Mays' testimony. There was considerable circumstantial evidence which the jury may have considered corroborative. Again, viewing the evidence in a light most favorable to the government, it showed that after his statement of July 9 revealing knowledge that the

[6] *Shipp* was a defendant's appeal from a conviction but, in view of *Steed,* the same rule must apply in reviewing the government's appeal for a post-conviction acquittal.

equipment was stolen, Arrington ordered Mays to forge Crockett's name to the backhoe title, received and looked over the fraudulent truck and trailer titles, and disbursed the $5,000 check, even though he had agreed to hold it for Shipley's instructions. His bookkeeper testified that he was irritated when he discovered that she had made a firm record of the transactions. After Shipley protested that the title to the truck was faulty and tried to prevent the disbursement, Arrington took no action to investigate or to correct the possible innocent or negligent part that he might have played in the transfer of a truck with a faulty title.

Arrington contends, however, that since the jury acquitted him of conspiracy to receive and sell stolen equipment moving in interstate commerce, its verdict finding him guilty of aiding and abetting was inconsistent, and on that basis the district court's judgment of acquittal was correct. He acknowledges the general rule that an inconsistent jury verdict is not a valid basis for a judgment of acquittal. *Hamling v. United States,* 418 U.S. 87, 101 (1974); *Dunn v. United States,* 284 U.S. 390, 393 (1932). He argues, however, that if he had knowledge of the crime and acted as he did, he would have necessarily participatd in the conspiracy. Arrington reasons that since the jury acquitted him of conspiracy, it could not have believed Mays' testimony concerning his knowledge, and therefore his conviction of aiding and abetting cannot stand.

There is simply no merit to that argument. There were several obviously differing elements of proof necessary for conviction under the conspiracy and aiding and abetting counts of the indictment. Conspiracy requires proof of "preconcert and connivance not necessarily inherent in the mere joint activity common to aiding and abetting." *United States v. Peterson,* 524 F.2d 167, 174 (4th Cir.

1975), *cert. denied,* 423 U.S. 1088 (1976). *See United States v. Wyatt,* 561 F.2d 1388, 1391 n.5 (4th Cir. 1977). While the "community of unlawful intent" necessary for aiding and abetting is similar to an agreement, it is not the same. *United States v. Bright,* 630 F.2d 804, 813 (5th Cir. 1980). The only evidence which the jury could have considered as proving pre-concert between Arrington, Crockett, Sexton and the others, was the same circumstantial evidence that the government introduced to corroborate Mays' direct testimony which established aiding and abetting. The jury could have simply believed that this was not sufficient to prove the kind of consent necesary to a conspiracy conviction.

The judgment of the district court is therefore reversed and the case is remanded for reinstatement of the jury's verdict and further proceedings consistent with this opinion.

REVERSED AND REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

UNITED STATES OF AMERICA

vs. CRIMINAL ACTION NO. 81-00098-A

JAMES E. ARRINGTON

ORDER

This case came before the court for trial by jury on May 4, 1982, and on May 7, 1982, the Jury found the Defendant not guilty of conspiracy but guilty of aiding and abetting.

Upon Defendant's Motion for Judgment of Acquittal and after conducting hearing on same, the court is of the opinon that there is not substantial evidence to support the jury verdict of guilty as to the charge of aiding and abetting. The court hereby sets aside said verdict and enters judgment of acquittal for the Defendant, and it is so ORDERED.

ENTER: August 26, 1982

/s/ James C. Turk
CHIEF UNITED STAES DISTRICT JUDGE

A TRUE COPY, TESTE:
JOYCE F. WITT, CLERK

By: /s/ L. Roberts
Deputy Clerk

CLERK's OFFICE U.S. DIST. COURT
AT ABINGDON, VA.
FILED AUG 26, 1982
Joyce F. Witt, Clerk
By: /s/ J. Roberts
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

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THE UNITED STATES OF AMERICA,
PLAINTIFF

versus CRIMINAL ACTION #81-00098

JAMES E. ARRINGTON,
DEFENDANT

****

BEFORE:
THE HONORABLE JAMES C. TURK
CHIEF DISTRICT JUDGE

ROANOKE, VIRGINIA
AUGUST 26, 1982

STENOGRAPHIC REPORT

of all the motions on the part of the respective parties and the action of the Court in respect thereto and other incidents in the motion for acquittal in the case of The United States of America, Plaintiff, versus James E. Arrington, Defendant, Criminal Action #81-00098, at Roanoke, Virginia, before the Honorable James C. Turk, Chief District Judge, on August 26, 1982.

APPEARANCES:

William P. Sellers, Esquire
Gaston Williams, Esquire
Assistant United States Attorneys
Roanoke, Virginia
Counsel for Plaintiff

John W. Swisher, Esquire
Frankin S. Fragale, Esquire
P.O. Box 2506
Charleston, West Virginia 25329
Counsel for Defendant

August 26, 1982
3:07 P.M.
Roanoke, Virginia

THE COURT: I'll ask the clerk then to please call the next case.

THE CLERK: The United States of America versus James E. Arrington, Criminal Action #81-00098.

THE COURT: All right, is the Government ready to proceed. We'll hear on the motions filed by the defendants and, depending on the Court's ruling on those, sentencing.

Is the Government ready to proceed?

MR. SELLERS: The United States is ready, Your Honor.

THE COURT: All right, is Mr. Arrington ready to proceed?

MR. SWISHER: Yes, Your Honor.

THE COURT: All right. Since Mr. Arrington is the moving party as to the motions we'll let counsel for the defendants go first.

MR. SWISHER: May it please the Court, I'd like the record to reflect that Mr. Arrington is present in the courtroom and represented by counsel, John W. Swisher and Franklin S. Fragale, of the law firm of Preiser and Wilson, Charleston, West Virginia.

Your Honor, before the Court today are post-trial motions, a motion for judgment of acquittal as to Count Two (2) and then the alternative, for the Court to grant a new trial as to Count Two (2).

THE COURT: Well let me say that what I'm particu-

larly interested in, concerned with, is whether or not there is sufficient evidence to support a conviction as to Count Two (2). That's what concerns the Court.

MR. SWISHER: Yes, Your Honor –

THE COURT: All right.

MR. SWISHER: Of course, I'm sorry – we – our contention is certainly that under the circumstances in this case that the circumstances are rather peculiar in this case. There was the conspiracy count as the Court remembers that the jury came back in after a four (4) or five (5) day trial and found the defendant not guilty.

Now, most of the evidence that was presented by the Government went to both the conspiracy count and to the substantine count. Now, the substantine count, Count Two (2), was aiding and abetting and the jury came back in and found him guilty of the substantine count, aiding and abetting.

If the Court will recall the circumstances that we were on a Friday when the jury was out. They had been out for some time. They came back in close to the five (5) o'clock evening hour and had several questions both from the foreman and from another member of the jury as to the time periods contained in each of the two (2) counts.

We felt that by the nature of their questions, wanting to know what we thought they meant, was wanting to know if they could consider anything after August the first of 1980 which – on Count Two (2) which was the cutoff period set down in the indictment by the Government in that Count Two (2), the language in that was that during the period of time between June fourteenth 1980 and August the first, 1980. Well, their questions indicated that they wanted to know if they were bound to these specific time periods or could they go outside of the deadline there that the Government had set of August the first. I think that the Court correctly informed the jury that they did

not have to be concerned with the Government proving precise dates that any action or act may have taken place.

However, in this case where we have the split verdict and as the Court will recall after the jury had asked their questions and had gone back in, that I requested the Court and the prosecutors to meet and we did meet. And I suggested to the Court that it was my opinion and I submitted to the Court that I felt what the jury was going to do was that they were going to compromise, that they were going to find him not guilty. At this time we did not know, but I felt that they were going to find Mr. Arrington not guilty of the conspiracy count and come back in and compromise on that Count Two (2). Fifteen (15) minutes later they did come back in with a not guilty on Count One (1) and a guilty as to the aiding and abetting.

I think that because the evidence prduced by the Government throughout the trial went not only to the conspiracy count, but also to the aiding and abetting count, was basically the same evidence. When the –

THE COURT: What about the evidence that was permitted to be introduced and came in, could come under dealing with the rules concerning a conspiracy, but would not have been admissible on the aiding and abetting count? I have in particular the evidence of Mr. Mays to the effect that Junior Crockett told him, "Well, I paid Mr. Arrington four thousand dollars ($4,000.00) for his work or his part in the thing." Clearly, that would not have been admissible on the aiding and abetting count.

MR. SWISHER: Yes, sir –

THE COURT: It was admissible in the conspiracy count, once there was sufficient evidence of a conspiracy.

What do we do with that evidence as to Count Two (2), as to the aiding and abetting?

MR. SWISHER: Yes, sir, that definitely would not be admissible on the Count Two (2). However, that – of

course, my memory of that was that Mr. Mays said that he did not pay Mr. Arrington any money.

THE COURT: No, he said that Junior Crockett, as I recall, he said that Junior Crockett told him that he had paid Mr. Arrington, I believe, four thousand – it doesn't matter, but –

MR. SWISHER: Twenty-eight hundred dollars ($2,800.00).

THE COURT: All right, whatever it was.

MR. SWISHER: Okay, and then Mr. Mays did say that Crockett told him that. Then the Government did not call Crockett. We called Crockett. Crockett said, "I paid Arrington nothing. I paid Arrington no money."

Now, Judge, it's our contention that the jury after the cross examination of this Mays fellow and what he had to gain through his testimony – it's our contention that the knowledge that's required in both of these counts, the interest that Mr. Arrington would have had, that is whether he was paid twenty-eight hundred dollars ($2,800.00) or not, whether Mr. Arrington did have anything to do with preparing that bill of sale. This is all uncorroborated testimony admitted. For example, Crockett said he gave no money. Mays is the only one that said that he had any financial interest and that he heard it secondhand hearsay from Crockett. Crockett denied it.

On the preparation of the bill of sale, Mays said that in the office, right there in Arrington's office, with Ms. Campbell – Katherine Jackson Campbell's office right across the hall – that Arrington told him, Mays, to go ahead and forge this name onto the bill of sale in the presence of Jackson.

Well, when Jackson took the stand she said, "I don't remember signing and notarizing the bill of sale, but that is my signature so I probably did. But I can tell you one thing; that I would never – I would sign – I would

notarize a document if an attorney brought it to me and said that John Doe signed it and, in fact, if – you know, if the attorney said John Doe signed it."

What Mays said was that this was done – the forgery was done in front of Jackson and she said very definitely that I would never notarize, never notarize, anything under those circumstances. So that counteracts that part of what Mays said.

Our contention is that – and also the knowledge part of it goes to both of these counts. All the way through this vast testimony that we listened to from the time this thing started down in Georgia, all the way through getting the property up into Virginia and then the transaction and so forth not one shred of evidence involving Jim Arrington, not one shred.

Then the transaction takes place on this eighth day of July -- of July, 1980. Then through this transaction all the people that have testified, Rutherford, Barker, Shipley, all the people who were there in Arrington's office that day, not one of them said that they thought that that transaction – that anything appeared illegal or anything about it.

Then, incredible as it may seem, nothing happened that afternoon – Arrington's testimony was it was a busy day and so forth. The very next day nothing happened. Arrington is not involved, not mentioned, his name never mentioned up to this time. Nothing in the setup or anything.

Then Mays who has made a deal with the Government, whatever it was. It certainly there were certain immunities and certain promises for testimony – comes along, no contact, no nothing with Arrington and the very next morning out of the clear blue sky he comes in here under oath and tells us that Arrington says, "The property is stolen, isn't it?" And Mays says, "Yes, it is."

And then the Government's whole case was that Ar-

rington dispersed the money after he knew that the property was stolen. That is incredible and the guidelines that we have on the judgment of acquittal is that if the testimony is uncorroborated and if it is incredible the Court can look at that testimony and weigh that testimony and find that it's not substantial. Now, the test is that it has to be substantial and it has to be the evidence that any jury would find a person guilty of, has to find beyond a reasonable doubt of every element of the offense. And when you look at the elements of the offense of aiding and abetting, when you go back and look at the evidence and realize that the only evidence of knowledge, of participation, of any financial interest, or anything came from Chuck Mays who I submit was completely impeached because if the jury had believed Chuck Mays they would have found Jim Arrington guilty of the conspiracy count. But they came back and said Jim is not guilty of the conspiracy count. So they didn't believe Chuck Mays.

Then they come back in and ask the Court, "Can we go on past August the first." The only thing that they could have been talking about after August the first was possibly the answer to the letter that Caldwell sent to Schelin. The letter came from — was written on the twenty-eighth day of July by Caldwell, Attorney Caldwell from Bristol, Tennessee, addressed to Schelin. Schelin testified that he didn't get the letter, but then some way — Jim Arrington was on vacation in Myrtle Beach with friends of his — came back Monday evening, July the twenty-eighth. His testimony was that within a week I found the letter. The letter had worked its way back to my desk and I found the letter.

Now, after he had appeared at the Grand Jury, after he had appeared at that trial back in '81 to testify and after the FBI had told him, "They're out to get you. Mays is out to unload on you," then he became concerned. Then he

went back to the office and started searching, searching, searching, trying to test everybody's memory, the girls, the secretaries, everybody's memory about the letter trying to find anything. Everything that he found as far as ledgers, parts of checks and everything else he voluntarily turned over to the Government before he was ever considered for indictment. He could not find his copy – he could not find the copy of the letter that came from Caldwell to Schelin that ended up on his desk. He found one secretary back there that remembered typing the response to that letter. At the trial – at our trial he testified that he did answer that letter. That answer would have had to been over into August. Also – and then Caldwell says, "Well, I didn't get that letter." But if you'll remember Caldwell's testimony, his own letter that he wrote to Schelin that Arrington ended up getting, his own letter – he couldn't even find the copy of his own letter for months later when he was cleaning out the pile on his desk and found his own letter. So it's very reasonable that Caldwell could have misplaced the response that Jim testified tht he wrote to that letter. But all that Jim's letter said in response to Caldwell's letter was the same thing that the first telephone call – when Caldwell wrote that letter on the twenty-eighth he also followed it up with a telephone call to the law firm. When he got somebody on the telephone all he said was, "The money's already been dispersed." They got off the phone, they went and checked and came back – it wasn't Arrington because he was on vacation in Myrtle Beach. Whoever came back checked on it with the bookkeeper and came back and said the money's already been dispersed. Caldwell writes his letter to the firm as a followup.

Then Caldwell says that later on he gets a telephone call from somebody at the firm. Now, in all his three-o-two's

of his interviews and so forth he's not one time ever tried to say that that person was Jim Arrington, and Jim Arrington very specifically in his testimony – we've checked the tapes again today and Mr. Sellers says in his reply to our motion that Mr. Arrington in his testimony said that he probably did make that telephone call back to Caldwell. Well, the tapes show that Mr. Arrington testified that he didn't make that telephone call back to Caldwell and he didn't make the telephone call back to Caldwell.

Your Honor, that was the telephone call where somebody had told Caldwell not to worry about it, it's an assembler and so forth. Now, Mr. Arrington did not make that telephone call. He's testified to that effect, so the only thing that that jury could have been looking at and want to hang their hat on was that they completely, by finding Mr. Arrington not guilty of all the acts in that conspiracy which was the same testimony that carried through that whole period of time clear up to August the first, the only thing that they could have been looking at was the possibility of whether Jim Arrington made that phone call to Caldwell. Not one time in the testimony was it ever identified that it was Arrington that made that telephone call.

Now, Judge, we're going back here and looking for evidence of a substantial nature that any rational jury could find somebody guilty beyond a reasonable doubt out of every material element. And the elements of aiding and abetting that we all know that they had to prove beyond a reasonable doubt that Mr. Arrington knew the venture was occurring. The only evidence we have of that is Mays' incredible testimony the day after this transaction when nothing, no knowledge had been shown, no involvement, no nothing, out of the clear blue sky the next day Mays gets up on that stand and says Arrington came to him. Just out of the clear blue, no contact after the transaction or anything. "The property's stolen, isn't it?" "Yes,

it is." That's the only testimony, the only evidence, of knowledge on the part of Mr. Arrington of this venture.

The second element is that Arrington – they had to prove beyond a reasonable doubt that Arrington had associated himself with this venture. There is no evidence other than Chuck Mays' testimony that Arrington in any way associated himself with this venture. In fact, Your Honor, if you want to look at the evidence we contend that this illegal transaction that took place with Chuck Mays being the ringleader ended when that property, when that equipment when the money passed into the escrow account and when Shipley took possession of that equipment which was very shortly. He got some of it the day of the transaction and the rest of it very shortly thereafter. If you want to take the Government's view that this transaction was not over until after the money was dispersed and the titles accepted, then fine, let's look at it. There was one share dispersed of twelve thousand dollars ($12,000.00) on July the eleventh. The money was put into escrow on July the eighth. Arrington testified that he waited three (3) days to wait for Shipley's check, nineteen thousand (19,000), to clear the bank so that he wouldn't be writing any bad checks out of his escrow account. That's reasonable. There was no problem with that twelve thousand (12,000) that was supposed to go because he had gotten the backhoe and the lowboy. The next check was seventeen hundred dollars ($17,000.00) to Barker a finder's feed, and there was no problem with that check. Shipley said, "Go ahead, fine. He's the finder and he gets it." Arrington was ready to disperse the seventeen hundred dollars ($1700.00), but according to the investigation, according to Barker's testimony Barker went off on vacation and wasn't around. So the minute he came back from vacation on the twenty-first day of July he came back then and came into the of-

fice and he got his check for seventeen hundred dollars ($1700.00). No problem. The big check as we recall from the trial was the five thousand dollars ($5,000.00), final five thousand dollars ($5,000.00) which was not supposed to go – here's where we had the confusion. If the Court will remember them all – most of them lined up, the people who were at that meeting, the day of our trial and testified about the time it was supposed to be received and then a notification from Shipley to the law firm.

But all the way through the Grand Jury statements, the three-o-two statements of these witnesses the trial back in 1981 – in fact, I read right from one page, page 142, of Mr. Shipley – now, let's look to the – let's look to Shipley, what he said in July before he was prepared for this trial in May of this year. Back in July of '81 when Arrington wasn't on trial, what did he say? I read right from page 142 of that transcript at least six (6) times during that trial that Shipley said himself that it was his understanding of the transaction that whenever Arrington, the law firm there, was satisfied that the titles were in good shape then fine, go ahead and disperse the money. So what happened? I mean, once again it wasn't Arrington running down and getting that phoney, fraudulent, forged title on the lowboy. No, that was Mays that went down there and put the sheriff's name on it and everything else. It wasn't Arrington that went runing over to Kentucky and got the fraudulent title on that truck. No, huh-uh, that was Mays that got Sexton and his compatriots to go get that title on that truck. Then when they come back with the title of the lowboy, July the eleventh. Title to the truck – when they signed the name – when Mays forged the name on the back of it, July the twenty-third. Arrington's testimony is that Mays come in and said, "We've got the titles. Everything is fine. Disperse the money." Right on the back of the title to the truck that they got from Kentucky where

they signed the name the date is July the twenty-third. It comes right into play very consistent with Mr. Arrington's testimony that on July the twenty-third that that's when Mays said, "The titles are okay. Disperse the money." So Arrington on that date, that's the date of the check for five thousand dollars ($5,000.00), July the twenty-third, sends the check out. Then Mays gives these titles over to Crockett at his house in Hurley and here they've been trying to run Crockett's kids back and forth to Shipley on foot or in the car over to Tennessee to deliver it and they can't make contact. They bring it back and finally mail it on the twenty-fourth. So that's when the envelope was postmarked, July the twenty-fourth.

So, Your Honor, getting back to the– back to the point I was making that after this then comes July the twenty-eight. That's when Shipley goes in to see Caldwell and he's going over to Bristol and says, "You know, there's something funny about this. The truck doesn't match up. The color of one's blue and one's white here with this title." And that's when Caldwell called the firm. He didn't get Arrington, he's on vacation. He gets somebody else. Schelin says he doesn't remember, but he could have gotten the telephone call and he says he didn't see that letter. He says he could have gotten the phone call. But all that was happening then was that Caldwell was told the moneys already been dispersed. Then after that Caldwell follows up with these letters the same date, the twenty-eighth of July, 1980. So on July the twenty-eight, 1980 all that could ever be imagined in this transaction was done. On this date the titles had been received, the money had been dispersed, the property had been turned over to Shipley and was taken to Tennessee. Nothing could have happened. The transaction if you want to take the most extended view possible of that transaction had to have been over on July the twenty-eighth, 1980.

Then the jury comes back in after not believing Mays. They had to have believed Mays to find Arrington guilty of Count One (1). They said, "No, sir."

THE COURT: But we say they had to believe. The fact that they didn't believe some of his testimony doesn't necessarily mean that they had to discard all of his testimony. They were at liberty to discard part of it. To think that he was not telling the truth about part of it or mistaken. But what do we do – and this is a question that concerns me – is there sufficient evidence to sustain the conviction if you accept as true Mays' statement to the effect that a day or so after they met in Arrington's office and Mr. Arrington said, "That was stolen property, wasn't it?" And he said he answered yes. If we except that, is there sufficient evidence to uphold this conviction?

MR. SWISHER: Well, I think there is some evidence, but I don't think that that satisfies –

THE COURT: Is it substantial evidence? That's what –

MR. SWISHER: I don't think that that satisfies all of the four (4) requirements of the elements of aiding and abetting. I don't think that that satisfies it. And, Your Honor, I submit that the jury could not have believed even that portion of Mays' testimony that then Arrington would have had knowledge. They would have found him guilty of that conspiracy count if they thought he had knowledge because after then then he dispersed the check. So he would have had knowledge and he would have taken part in what was going on.

THE COURT: Well, they could have found well, no, he wasn't a part of the conspiracy. He didn't have anything to do with these arrangements, but that he aided in abetting the sale of it after it was in, could they not?

MR. SWISHER: But, why – then why, Judge, did they find him not guilty and then come back in and want to

focus after August the first? Why did they want to focus after August the first?

THE COURT: Because I think they were concerned about the activities that took place around or about August the first dealing with the notification about the – not to disperse and the fact that it had already been dispersed and so forth. The letters from the attorney, I think they were – I think that was what was concerning them.

MR. SWISHER: Well, I think the only thing they could have been concerned about was Arrington answering the letter. He testified tht he did not make the phone call.

THE COURT: I understand –

MR. SWISHER: And his testimony about the letter was – is that all he said was he reiterated the fact that the money had already been dispersed. But, still that is not sufficient evidence to prove four (4) elements of aiding and abetting. Just merely writing the letter stating the money had been dispersed doesn't show that he had knowledge that the venture was occurring. It doesn't say that he is –

THE COURT: But what if the jury had felt like, well, Mr. Arrington, you know, if he weren't guilty this would have at least said, "Well, I'm sorry that this was done and will make it good."

MR. SWISHER: Well, Your Honor, I think that Mr. Arrington testified that when he wrote the letter that he felt that certainly – that Mr. Caldwell would get back with him – was, you know – hey – he felt at the time that that was all that he needed to do. He would either go to the authorities or that he would get back with him. As far as what he knew when he wrote that letter was I participated in a very small part in a legitimate business transaction and I did – the best evidence of what was supposed

to have been done with that money, the dispersement and the manner of dispersement, is to look at the receipt.

Now, if Mr. Arrington was in on this he wouldn't have gone through the bit of writing the receipt or putting the money in his escrow account. He wouldn't have waited all this time. He would have said, "Come on, boys, let's get down to the bank. We've got nineteen thousand (19,000). Let's get down to the bank and cash this and divvy it up." No, he puts it in the escrow account and waits this time until he thinks he supposed to disperse it. The receipt that was accepted and looked at and examined and gone over on that day, on July the eighth, with Arrington and Shipley and was agreeable with Shipley didn't have anything on there about the title to the property.

Mr. Arrington acted in what he thought was a legitimate business transaction. When he came back from the beach and heard that somebody had been inquiring and saying – had called in and said that the titles were not good or that the truck didn't match up with the title he wrote the letter reiterating that the money had already been dispersed. He felt that Caldwell would get back with him or that Caldwell would go to the authorities or Shipley would go to the authorities and then they would come to him which is what happened.

Your Honor, there is – the fact that that jury came back in and Mays – and Mays – and we all know what part Charlotte Foleno tried to play in it and we all knew before the trial was over what connection she had with Chuck Mays. Well, really she didn't add that much to it. She's the one that charging the phone calls, calling Mays back and forth clear up to the time of the trial and charging them to Arrington's phone bill even after she doesn't work there.

But it's Mays and if they had believed Mays – if they had believed Mays when he said that Jim came to him and

said, "The property's stolen." If they had believed Mays that Arrington got twenty-eight hundred dollars ($2800.00) that Crockett said that Arrington got twenty-eight hundred dollars ($2800.00). If they had believed Mays that Jim Arrington had took a part in preparing that bill of sale which their own Government witness, Katherine Jackson, said, "No way did it ever happen that way. That I would have notarized something with somebody right in front of me forging somebody else's name to it. No way."

Those things were completely the main elements of what Arrington was supposed to have done and were completely discredited. And Mays, the guy who tried to say that all of my troubles, all of me going sour, all of me going bad was because I was associated with the devils at that law firm. But after he left the law firm – and he left the law firm after all of this was over – he wrote that letter that we all saw saying what a great place it was. What a great bunch of guys they were. How good they were to him. How proud he was to be a member of that organization. That guy that took that stand to get immunity from several charges – took that stand and testified against Crockett in two (2) other trials, got out there and tried to sell this man, this lawyer, that this – well, I'm not going to go over it. This Court – the job done by this probation officer in this presentencing report is excellent. One of the best I've ever seen.

This Court – you, Judge Turk, you know Jim Arrington. Now, you know his family and you saw the trial. You know what the people think about him. You know what the doctors, lawyers –

MR. SELLERS: Judge, are we arguing punishment here–

MR. SWISHER: No, we're not arguing punishment. We're arguing on the evidence.

MR. SELLERS: I've been patient, but we're beginning to get into an argument on the man's character, not on the facts of the case as presented.

MR. SWISHER: I'm –

MR. SELLERS: I heard it and, you know, I'm sure you heard it, Judge.

MR. SWISHER: I'm talking about the believability of Chuck Mays. You heard the witnesses commend the credibility of Chuck Mays. The witnesses came in at trial – even his own relatives and said they wouldn't believe him under oath. Yet five (5) or six (6) people come in and tell you what Jim Arrington's been like for thirty (30) or thirty-four (34) years that they have known him. And all the people that have been contacted since say that he is honest. He's a hard worker and all of the other things that are said in that report.

No, Your Honor, in answer to your question, we don't have substantial evidence here that a jury, a jury that on Friday evening at fifteen (15) till five (5) asked questions, that we want to go outside the time period, and come back in fifteen (15) minutes with a compromised verdict because the weekends on them. No, we don't have substantial evidence. We have a compromise on their part at five (5) o'clock on a Friday evening before a weekend, a beautiful weekend –

THE COURT: Well, as I recall though in the conference there with me you thought they had already found him not guilty of the conspiracy count.

MR. SWISHER: That was my contention. I felt that they had already found him not guilty of conspiracy and that they were wanting to compromise on something and as you recall I wanted you to –

THE COURT: To call them back. I recall that.

MR. SWISHER: And to instruct them on the elements of aiding and abetting. Which fifteen (15) minutes later

they came back and found him not guilty and in my opinion they compromised on that – there's no evidence –

THE COURT: All right, let's see what Mr. Sellers has to say and then I'll give you an opportunity to respond.

MR. SELLERS: Your Honor, I think that the counsel neglected to mention one salient feature here now under consideration and that is to say that the evidence of his juncture is viewed in the light less favorable to the Government. That is a rather heavy burden –

THE COURT: But there has to be substantial evidence to support the jury verdict.

MR. SELLERS: We had a rational jury, Your Honor. We had – certainly let me contend at the onset that we had a rational jury here. I don't think anybody could doubt that. They were the most attentive jury I've perhaps ever tried a case before.

I think before we go any further we should correct the misconception of counsel as to the question asked by the jury. The *counsel* did not focus on the date of August the first. The language is from the foreman, on Count Two (2) of the indictment we would like to know on the dates of June to August first, was it also on or about like the first part, that is to say the conspiracy count. They didn't focus on either August first or June. I think the Court –

THE COURT: Well, we know that – I mean, there was no evidence at all that he was involved in June and when they were saying as to August the first we know that they had to be concerned with on or about August first.

MR. SELLERS: They could have easily have been concerned with whether or not the equipment was in fact stolen on the particular day in June alleged I submit to the Court.

THE COURT: There's no evidence of Mr. Arrington's involvement until the day before the – but, the thing that

concerns the Court about it is the evidence that came in and was admissible under the conspiracy count, but would not have been admissible had we not had a conspiracy count. That's the thing that concerns me, whether or not it's fair to convict this man – and we don't know whether the jury considered evidence as to Count Two (2) that couldn't have been admitted had we not had the conspiracy charge in it.

MR. SELLERS: Your Honor, the issue is whether or not at the moment of the inception of that evidence the Government had made a prima facie case of conspiracy. At that time you had an individual who was allegedly a co-conspirator testifying that he had an agreement with the defendant and he was proceeding then to relate conversations between other conspirators.

THE COURT: But it was admissible and the Court gave the jury limiting instructions. That is, admissible only as the conspiracy, but then –

MR. SELLERS: Yes, sir, but that was only one piece of evidence. That only related to a fact of twenty-eight hundred dollars ($2800) which is not an element of aiding and abetting, receipt and sale of stolen property moving interstate. That's not one of the elements. We don't have to show that he benefited financially in one scintilla. So you can sweep that piece of evidence out.

The fact remains, Your Honor, that we had evidence from Chuck Mays that as the Court has pointed out that he spoke either the evening of the transaction or the day after was his testimony, he didn't recall which, with the defendant and they had the conversation, is this stolen equipment and he was told, "Yes, it is." And he says, "Okay, you take care of it."

Now, I submit to you that the jury is the sole judge of the credibility of those witnesses and they had to believe Mays in order to convict him or Count Two (2). You can't

convict the man without believing Mays' testimony in Count Two (2) of this indictment. You can find him not guilty of conspiracy and still believe Mays if you do not believe that he ever joined the conspiracy. And we had no evidence of the smoke filled room. The Government was aware of that. We argued to that jury that we didn't have to show the meeting of all the people together in the smoke filled room, but I felt all along that they wanted to see that and we could not produce it. We could only produce the meeting of the minds between Mays and Arrington and then Mays meeting with the other conspirators. Now, under the law we know that's all that's required, but the instructions of the law on conspiracy is difficult. It's difficult for laypeople to understand. It's very much easier for them to understand aiding and abetting. Doing an act to help somebody and doing it knowingly. Now, that was proved beyond a reasonable doubt. You may have a question of whether he joined a conspiracy, but you can still find him guilty of aiding and abetting. Now, I submit that's what the jury did. And the evidence was from Mays that he told him and then what action did Arrington take after he was told that the equipment was stolen? He proceeded to disperse the monies. He proceeded to tell Mays to forge the signature on the document which Mays has testified he did do alone with Arrington, I believe, as I recall.

In any event, they say Mrs. Jackson said, "No, it didn't happen." She didn't remember the transaction if you recall the testimony. There were other corroborating pieces of evidence. Ms. Foleno about Arrington requesting, "Why did you set up the ledger card on this transaction?" He didn't want her to do it. He seemed irritated, she testified. She also said that at one point he said – she asked him was the law firm involved in any illegalities. And he said yes, maybe they were, he says.

And if you want to talk about incredible testimony, look at the prevarications, the perjury this man committed on the stand, I submit to the Court. He testified at Grand Jury and he testified under oath in July a year ago all about how he didn't do anything when he got the letter from Caldwell. Then he pops up on the stand when he'd indicted and says, "Oh, I answered it." The first time we ever hear that. "I answered it." The jury had a chance to judge the credibility of the witnesses. They put them in the balance and he was found wanting. And that's an important point here at this juncture, Your Honor, when you're viewing the evidence in a light most favorable to the Court — to the Government because the light most favorable to the Government would say that Mr. Mays was believed. The Government has evidence here if you believe Mays beyond a reasonable doubt. When you look at the actions of the law firm and this man after the transaction has come to a point where false titles are sent to purchaser.

Your Honor, the testimony of Rutherford, the testimony of Shipley was concrete and clear in understanding at the closing of this transaction in the law office was that when good title, clear title, is received by Mr. Shipley he would call Mr. Arrington and tell him to disperse the funds, the remaining five thousand dollars ($5,000.00) being held in escrow. Not when Arrington decided the transaction was completed and he never, ever, got clear title, Your Honor. He told you in his own testimony, "I wouldn't pay for something until I got title for it." And as soon as he got bogus title he had his attorney call the law firm and they start the old side step at that point. Oh, look the money's already dispersed. And then the phone call comes back, "Look it's made up of other parts of other trucks." Mr. Arrington as I recall, Your Honor, testified, "I think I made a phone call."

If you recall the conference that was held when the ques-

tion from the jury came through, Your Honor said in sitting in the room in the back part of the clerk's office, "Well, Mr. Arrington testified he made a phone call, maybe that's the phone call he's talking about." And I remember it, I wrote it down because I remembered the same thing, that he testified, "I may have made a phone call." And I realize that's a complete contradiction of everything he's ever testified to under oath, but for Arrington that's not unusual.

Your Honor, there is clearly sufficient evidence viewed in light favorable to the Government that the jury as the sole judges of the credibility of the witness could have concluded beyond a reasonable doubt that Mr. Arrington was guilty of the offense of aiding and abetting.

I don't know why they didn't convict him of conspiracy. I can suggest to you several reasons why they didn't: a compromise, a failure to understand the intricate art of the language of that law. I don't know, but surely if you believe Mays and there's no suggestion that they did not — and to delve into the meaning of the not guilty verdict on the conspiracy I submit is going into areas we can not go into.

I just don't think that there's any question that there's sufficient evidence viewed in the light most favorable to the Government to substantiate a conviction.

MR. SWISHER: Yes, Your Honor, just a short reply. Mr. Arrington — Mr. Sellers wants to go back to the Grand Jury testimony of Mr. Arrington, he wants to go back to the trial testimony of 1981 of Mr. Arrington when he wasn't on trial. Mr. Arrington testified in 1982 at his own trial what badgering, what harrrassment took place back during the Grand Jury period and back during the trial period. Mr. Sellers wants to come right out and say that Mr. Arrington at the trial of 1981 when he was not on trial said that he did not write the letter to Caldwell. If you

look at the transcript – which I looked at it again last night – when the Court questioned Mr. Arrington he said – again of that testimony if you want to take the whole context of it, he said, "I don't remember writing a letter, but I could have written the letter." Now, this seems very reasonable to me, Your Honor, that you give a guy that's practicing law, very busy, he doesn't know that he's been suspicioned of anything, he cooperates. The FBI comes to him and he gives them all the records he can find. He's called before the Grand Jury. He could have hired counsel and taken the Fifth Amendment if he thought he was in any trouble, but he didn't. He went to the Grand Jury. He, obviously, was not prepared. He had not thought about it. He had not tried to think back a year before as to what happened in a transaction that only took fifteen (15) minutes. The same thing at the trial. He goes on trial, only at this time does he find out by Klotz telling him, "Mays and those guys are out to unload on you. They're going to unload on you." Then after that he comes to us and we start looking into it. We start digging and delving and then when we come up for the trial in 1982, yes. Certain things are clarified, certain things are recalled by talking to secretaries, talking to other people in the firm. Talking about things which brings back the recall of people.

A busy lawyer practicing law. How many telephone calls? How many letters did he write a day? A year later – if I had to go back right now or a year from now and think back and try to remember a transaction or something that took place in my office or whether or not I wrote a letter or not would be very, very difficult until I started probing the minds of everybody that works with me as to what I did. Looking at calendars, looking at this, looking at that.

And they made a big thing there was no file kept on this. Mr. Caldwell didn't keep a file either. It took him months to find the single letter that he wrote. Mr. Arrington didn't

have anything to do with preparing the bill of sale so he didn't have a bill of sale to put in the file. Mays had that bill of sale prepared from a form that they had in the office and then forged the names on it.

You want to talk about the telephone call? We listened to the tapes again today after I read Mr. Sellers' response to our motion where he alleged that Mr. Arrington said, "I probably did make that telephone call to Caldwell." We came back over this morning and Clara Mosher made the tapes available and we listened to them. No place in there — he denies making that phone call. Mr. Arrington says the only phone calls that he remembered at the time of the trial of making was he possibly could have made one or more phone calls the day of that transaction to check on the title and to make arrangements for that equipment to be moved on the road without the proper permits or license or whatever. I mean, here's another guy that is going out and calling the State Police, calling the Department of Motor Vehicles and everybody else to get a permit and make it easier for this guy to move the equipment on the road. I mean, if he was in some kind of fleecing, he's not going to be calling the State Police.

Judge, conspiracy opens the door. I mean, it is the Government's wonderland. It opens the door to everything.

THE COURT: It's a broad umbrella, isn't it?

MR. SWISHER: It sure is. And that conspiracy, the fact that we had conspiracy charged here. And the fact that we had this aiding and abetting down at the end, we came in here in front of that jury and opened up this mass of everybody saying everything that would never have come in any other time. Otherwise, if they hadn't of had that and hadn't of heard all of this stuff that wouldn't even have been admissible in another charge they would not even have felt they had to compromise on something.

No, they didn't believe this Viet Nam War hero that was

corrupted by the Eagle Scout, Your Honor, and his law firm, that afterwards wrote the love letter and then later when he was getting ready to go on trial himself in July of '81 gets with his attorney and contrives this ethics complaint against Arrington wherein he says at that time, I talked to you as attorney-client on this matter.

My Lord, Judge, if Arrington was involved as Mays said he was the day after the transaction and he knew what was going on, why would this man come to him on an attorney-client basis? He would already know all about it.

He contrived that. His defense at that trial before he decided to plead guilty on the third day of the trial was Arrington was the brains behind it and I was a puppet and he was using me. He sent the ethics complaint in. We produced it, showed it, every word in it and what all it said. Mays couldn't even tell the truth about how long he served in Viet Nam. It was incredible, Judge. No connection, no nothing with this Arrington in this elaborate scheme that he was obviously the brains of. Even testimony to the effect that Mays told Arrington, "You're the only attorney that's going to be in the office on that day so will you please handle this transaction?" He was too busy. He didn't want to handle it. And then the next day with nothing happening. Not one bit of contact with Arrington. Not one bit of anything else happening to the case. Is it logic, Judge, that this Arrington is going to come up and say, "It's stolen, isn't it, Chuck?" And Chuck said, "Yes, it is." No Judge, it didn't happen in that way. This was the man who made a deal for himself and made the statement to a very personal friend of his named Roger Owens on the State Police, "If I go to jail I'm going to take a lot of people with me."

We don't have evidence, Judge. We have some minds of jurors that were clouded by a lot of hearsay that was allowed to come in during a conspiracy charge. They felt

that maybe he did something. You know, maybe he did something. But no evidence – no evidence beyond a reasonable doubt to convict and take this man's livelihood away from him. Yes, it's not just a matter of prison time and fine. No, here's the man who worked his way through law school. Who's worked himself into a practice of law, is successful. No, it's not like Chuck Mays who can go from one job to the next, to the next, to the next or Benny Mitchell who can go down in Georgia and serve a few days and come back up and testify or the other people. No, this man, it's his livelihood. What he has worked since he got out of high school to be, a lawyer. And everybody that your probation department over here talked to said that he is competent. He is hard working. We take his advice. Are we going to let somebody like Chuck Mays who pointed a finger and put the finger on this man because the Government wanted a lawyer or are we going to hold the system of this criminal justice – the standard of this criminal justice system as it's supposed to be? Each and every element beyond a reasonable doubt. And I submit, Judge, it's not there. It's not here and it's never going to be here because all they've got – the Government got in a bind and had to base their case on that Chuck Mays. And they fell short and we can't take this man's livelihood away from him with that kind of stuff.

Thank you, Judge.

THE COURT: All right.

MR. SELLERS: Your Honor, if we fell short, we wouldn't be here today. In fact, we didn't fall short. He was convicted by twelve (12) individuals who found him guilty on that indictment, that part of the indictment, beyond a reasonable doubt.

I have nothing further to say.

THE COURT: All right. Gentlemen, I'll say this, the case has given the Court a great deal of difficulty. When I came on the bench almost ten (10) years ago now I said I'm never going to take a case home with me. When I leave at five (5) or six (6) or seven (7) or eight (8) then I don't think about them until I get back. I haven't been able to do that in this case. It's concerned me from the time the jury came back. Had the jury returned a verdict of guilty as to the conspiracy count I would not have had any doubts about the sufficiency of the evidence to convict on that count, but the jury returned a verdict of not guilty as to the conspiracy count. And then when we eliminate that evidence that was admissible only as to the conspiracy count that's what gives the Court trouble.

Now, I'm familiar with the Steed Case. It came from this Court and the ruling of the Fourth Circuit was that once you send a case to the jury, if the jury convicts, then the jury verdict must be upheld if there is substantial evidence looking at it in the light most favorable to the Government to support it. With that standard though this Court is of the opinion that there just is not substantial evidence to support the jury verdict. And given the obligation of the Court to prove guilt beyond a reasonable doubt the Court finds as a matter of law that the evidence in this case is insufficient to sustain the conviction. The Court will grant the defendant's motion for judgment of acquittal.

I'll say this, I hope the Government will appeal this case. I did not grant judgment of acquittal when the Government — I mean, when the defendant rested. So I sent it on to the jury and if there's error in this case I want the Court of Appeals to correct it, but if this Court is going to make error I want it to be on the side of the defendant and not on the side of the Government.

I just do not feel that there is sufficient evidence looking at it in the light most favorable to the Government and taking every reasonable inferences that you could draw therefrom I just feel that there is not sufficient evidence to support the jury verdict.

This Court is always reluctant to disturb jury verdicts and I do it with – after much thought in this case. I discussed this case many times with the probation officer because it's given me great concern from the day it was returned. And I want to say again, I hope the Government will appeal this case and let the Fourth Circuit pass on it. And if the trial judge has erred the Fourth Circuit can send it back and ask me to reinstate – enter up judgment on the jury verdict.

Gentlemen, the Court today will enter an order granting the motion for judgment of acquittal.

All right, I ask the marshal to declare just a short recess at this time.

(Proceedings are concluded)

CERTIFICATE

I, Clara L. Mosher, Official Court Reporter for the United States District Court for the Western District of Virginia, reporting in said Court, hereby certify that the foregoing is a true and accurate transcript of the motion for acquittal in the case of The United States of America, Plaintiff, versus James E. Arrington, Defendant, Criminal Action #81-00098, before the Honorable James C. Turk, Chief District Judge, on August 26, 1982, in Roanoke, Virginia.

/s/ Clara L. Mosher
OFFICIAL COURT REPORTER

August 30, 1982